

No. 118585

IN THE
SUPREME COURT OF ILLINOIS

IN RE: PENSION REFORM
LITIGATION (consolidated pursuant
to Supreme Court Rule 384)

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On appeal from Circuit Court of the
Seventh Judicial Circuit, Sangamon
County, Illinois

Case No. 2014 MR 1

Honorable John W. Belz,
Judge Presiding

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY
WILL-GRUNDY CENTER FOR INDEPENDENT LIVING,
TRANSITIONS MENTAL HEALTH SERVICES,
MENTAL HEALTH CENTERS OF ILLINOIS,
YOUTH NETWORK COUNCIL (D/B/A ILLINOIS COLLABORATION ON
YOUTH), MARCFIRST, AND OMNI YOUTH SERVICES**

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FILED

JAN 13 2015

**SUPREME COURT
CLERK**

(6)

Pursuant to Rule 345(a) of the Supreme Court Rules of Illinois, Will-Grundy Center for Independent Living, Transitions Mental Health Services, Mental Health Centers of Illinois, Youth Network Council (D/B/A Illinois Collaboration on Youth), Marcfirst, and OMNI Youth Services, respectfully request that the Court grant them leave to file *instanter* the *amici curiae* brief accompanying this motion in support of appellant the State of Illinois. In support of this motion, *amici* state as follows:

1. *Amici* are private, non-profit social services agencies in various regions of Illinois who rely on state funding sources to meet critical needs of the state's most vulnerable citizens.

2. Will-Grundy Center for Independent Living (WGCIL) is a community-based non-profit organization that strives for equality and empowerment of persons with disabilities in the Will and Grundy County areas. WGCIL informs persons with disabilities of their rights, educates them about their responsibilities, provides support services, promotes advocacy, and raises community awareness about disability issues. WGCIL depends on state grants and private contributions to fund its \$900,000 annual budget. WGCIL is interested in this case because of the impact that budget cuts to fund pension obligations will have on its grant funding and ability to fulfill its mission.

3. Transitions Mental Health Services (TMHS) is a community-based not-for-profit organization in the Quad Cities region that provides rehabilitation, therapy, counseling, consultation, education, advocacy and support services to persons with mental disorders, their families and the general community. TMHS strives to provide those it serves with the tools necessary to live productive, safe, independent and healthy lives. For more than 30 years, TMHS has provided critical services and opportunities to

persons with mental disorders including housing, employment, employment training, advocacy, counseling, psychiatric care, consultation, therapy and support. TMHS is interested in this case because the organization already has been dramatically affected by previous budget cuts and is concerned about the impact budget cuts to fund pension obligations will have on its state funding and on its ability to continue to fulfill its mission.

4. Mental Health Centers of Illinois (MHCCI) is a private, not-for-profit organization providing high-quality, comprehensive behavioral health and rehabilitation services that serves more than 9,000 individuals a year in Logan, Mason, Menard, Morgan, Sangamon and Scott Counties. The organization provides behavioral services including crisis intervention, psychiatric and medical services, screening and assessment, outpatient therapy, case management, group education and support, employment services, as well as residential care. MHCCI is interested in this case because of the impact that budget cuts to fund pension obligations will have on its state funding and on its ability to continue to fulfill its mission in the communities it serves.

5. The Youth Network Council, which operates under the name Illinois Collaboration on Youth (ICOY), is a private, non-profit membership and advocacy organization that works to ensure the health and safety of Illinois youth and families by providing capacity-building services -- training, technical assistance, and policy advocacy. ICOY focuses on developing and strengthening the systemic, community and individual supports necessary for our youth to have safe childhoods, and eventually, prosperous and healthy adulthoods. ICOY strives to reduce youth involvement in the child welfare and juvenile justice systems. ICOY is interested in this case because the organization already

has been dramatically affected by previous budget cuts and is concerned about the impact budget cuts to fund pension obligations will have on its state funding and on funding to the youth service agencies that are its members and to which it provides services.

6. Marcfirst is a nonprofit community-based social service agency whose mission is to guarantee the personal dignity of people with developmental disabilities and to promote their personal achievements based on their dreams, desires and abilities. Marcfirst provides pediatric therapy services for families with children from birth through age fourteen who have developmental disabilities or delays or who are at risk for delay; assists people with developmental disabilities with the transition from high school to adulthood; provides pre-employment training, employer education and on-the-job training to help its clients gain and maintain employment; and provides other life skills, residential services and family support in the Bloomington-Normal area. Macfirst is interested in this case because of the impact that budget cuts to fund pension obligations will have on its state funding and on its ability to continue to fulfill its mission in the communities it serves.

7. OMNI Youth Services is the largest and most comprehensive youth services organization serving Chicago's northwest suburbs. OMNI Youth Services works to develop responsible youth and strengthen families through numerous initiatives including counseling services, mentoring programs, substance abuse and treatment programs, services to juvenile offenders, community service projects, youth development programs, work with neglected and abused children, and multicultural resource center programs. OMNI Youth Services is interested in this case because of the impact that

budget cuts to fund pension obligations will have on its state funding and on its ability to continue to fulfill its mission in the communities it serves

8. *Amici* have a strong interest in the outcome of the case. As the state's experts demonstrated in the proceedings below, if the circuit court's ruling is upheld and pension reforms are struck down, the state will face a \$1.3 billion immediate pension funding shortfall, on top of its existing structural budget deficit. The state will be forced to make up for this this shortfall, at least in substantial part, by making funding cuts elsewhere in the budget. History has shown -- and *amici* can attest -- that when the state is forced to make budget cuts, social service agencies and the vulnerable populations they serve frequently bear the brunt of those cuts, because there is little flexibility elsewhere in the state's budget. *Amici* have, over the last decade of consistent budget cuts, reduced services to their clients, cut back on staff, and closed waiting lists to new clients, all as the Great Recession and its aftermath have resulted in substantial increased need for the valuable social services they provide. In short, if the state is prevented from moving forward with the reasonable and modest pension reforms at issue in this case, the social safety net in Illinois will be shredded. This possibility directly impacts the ability of *amici* to fulfill their missions and will further exacerbate the deepening need for their services.

9. *Amici* respectfully submit that the attached *amicus curiae* brief will assist the Court in its consideration of the issues raised by this appeal. With respect to the legal arguments, this brief takes a step back to place the constitutional arguments in the context of broader constitutional decision making. The brief makes the point that there are no real absolutes in constitutional law -- using the preferred constitutional right, the First

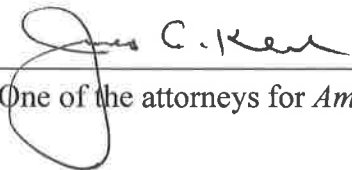
Amendment as a prime example – and fortifies this analysis with the scholarly views Justice Stone, Holmes, Cardozo and Dean Roscoe Pound.

10. With respect to the financial crisis confronting the State, this brief will provide factual and contextual background about how the state's fiscal crisis has affected funding for social service agencies in the state and the impact that striking down pension reform will have on the state's most vulnerable citizens. This perspective is relevant to assisting the Court in understanding the extraordinary fiscal emergency that the state faced in enacting pension reform.

WHEREFORE, *amici* respectfully request leave of the Court to file the attached *amici curiae* brief.

Dated: January 12, 2015

Respectfully submitted,


One of the attorneys for *Amici Curiae*

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CERTIFICATE OF SERVICE

I, James A. Klenk, an attorney, hereby certify that I caused a copy of the foregoing **MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY WILL-GRUNDY CENTER FOR INDEPENDENT LIVING, TRANSITIONS MENTAL HEALTH SERVICES, MENTAL HEALTH CENTERS OF ILLINOIS, YOUTH NETWORK COUNCIL (D/B/A ILLINOIS COLLABORATION ON YOUTH), MARCFIRST, AND OMNI YOUTH SERVICES** to be served upon the following:

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January, 2015.



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FILED

JAN 13 2015


**SUPREME COURT
CLERK**

Counsel for the parties to this case, listed on the attached certificate of service, are hereby notified that on January 12, 2015, amici curiae Will-Grundy Center for Independent Living, Transitions Mental Health Services, Mental Health Centers of Illinois, Youth Network Council (d/b/a Illinois Collaboration On Youth), Marcfirst, and Omni Youth Services, by and through their counsel, filed with the Illinois Supreme Court a Motion for Leave to File Brief as Amici Curiae in Support of Defendants-Appellants, draft Order, and a proposed Amici Curiae Brief to the Illinois Supreme Court. The filing was sent via Federal Express overnight delivery to the Illinois Supreme Court Clerk.

One (1) paper copy of this Notice, one (1) paper copy of the Motion for Leave to File Amicus Curiae Brief and draft order, and three (3) paper copies of the proposed Amici Curiae Brief in Support of Defendants-Appellants were served upon counsel for the parties in this case via United States mail, properly addressed, with postage prepaid, on January 12, 2015.

Dated: January 12, 2015

Respectfully submitted,



One of the attorneys for *Amici Curiae*

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STATEMENT OF INTEREST

Amici are six social service agencies from various regions of the state of Illinois who serve many of the state's most vulnerable citizens, including at-risk youth, persons with physical disabilities and their families, persons with mental disorders and their families, and persons with developmental disabilities and their families. They have a strong interest in the outcome of this case, because they have seen the impact that years of persistent budget cuts have had on their ability to fulfill their missions and to improve the lives of the vulnerable populations they serve, and, thereby, the communities in which they are located. As further discussed herein, the state's experts have shown that, due to inflexibility in most of the state's budget, social service or human service agencies often bear the brunt of budget cuts necessitated by growing pension funding shortfalls, and *amici* are concerned that they will be decimated if pension reform is struck down and the state is forced to cut funding to accommodate ballooning pensions costs.

Amici are Will-Grundy Center for Independent Living (WGCIL), a community-based non-profit organization that strives for equality and empowerment of persons with disabilities in the Will and Grundy County areas; Transitions Mental Health Services (TMHS), a community-based not-for-profit organization in the Quad Cities region that provides rehabilitation, therapy, counseling, consultation, education, advocacy and support services to persons with mental disorders, their families and the general community; Mental Health Centers of Central Illinois (MHCCI), a private, not-for-profit organization providing high-quality, comprehensive behavioral health and rehabilitation services that serves more than 9,000 individuals a year in Logan, Mason, Menard, Morgan, Sangamon and Scott Counties; The Youth Network Council, which operates under the name Illinois Collaboration on Youth (ICOY), a private, non-profit

membership and advocacy organization that works to ensure the health and safety of Illinois youth and families by providing capacity-building services -- training, technical assistance, and policy advocacy; Marcfirst, a McLean County nonprofit community-based social service agency whose mission is to guarantee the personal dignity of people with developmental disabilities and to promote their personal achievements based on their dreams, desires and abilities; and OMNI Youth Services, a youth development organization serving Chicago's northwest suburbs that works to develop responsible youth and strengthen families through numerous initiatives including counseling services, mentoring programs, substance abuse and treatment programs, services to juvenile offenders, community service projects, youth development programs, work with neglected and abused children, and multicultural resource center programs.

AN OVERVIEW OF ILLINOIS SOCIAL SERVICES SPENDING SINCE 2000

\$2.1 Billion in Real Social Services Spending Slashed Since 2000

The Great Recession and the State's pension funding obligations have devastated the State's ability to fund social services across the State. Today, one out of every five budget dollars is spent on funding pension obligations.¹ These growing pension obligations have "crowded out" the State's ability to fund basic social services.² Since 2009, the State has slashed spending on state services by \$4.7 billion.³ One analysis shows that spending on human services fell by \$2.116 billion in real, inflation-adjusted

¹ P. Worthington Expert Report dated August 22, 2014, Exhibit 3 in the Appendix to Defendants' Statement of Facts in Support of Motion for Summary Judgment, filed October 3, 2014, at 6-7 (hereinafter "Worthington").

² J. Basham Expert Report, dated October 2, 2014, Exhibit 4 in the Appendix to Defendants' Statement of Facts in Support of Motion for Summary Judgment, filed October 3, 2014, at 12 (hereinafter "Basham").

³ Center for Tax and Budget Accountability, Analysis of the 2014 Illinois General Fund Budget, 1 (October 2013), *available at* <http://www.ctbaonline.org/reports/analysis-fy2014-general-fund-budget> (hereinafter "CTBA Analysis").

dollars, a 29.7% reduction, between FY2000 and FY2014.⁴ “Reductions in spending are most keenly felt by residents consuming significant services,”⁵ and this means that the budget cuts hurt those of our citizens who are most in need and who cannot otherwise afford to pay.

\$6.4 Billion Dollars In Unpaid Bills

Compounding the social service budget cuts, the State has sought to fund its deficits by failing to pay its bills on time. Since the onset of the Great Recession, the State of Illinois has not paid its bills on time and has pushed billions and billions of dollars of bills into subsequent years. At the close of FY2015, that bill backlog alone is projected to be more than \$6.4 billion.⁶ As one of the State’s experts below put it, “Delaying payments [of vendor bills] has serious negative effects on social services, medical providers and other vendors ... and is not a sustainable funding plan in the long run.”⁷ This phenomenon has been well-documented in the state. *See, e.g.*, Kerry Lester, “Illinois Ends Fiscal Year \$6.1B in Red,” *Northwest Herald*, July 2, 2013, at A3 (“Saddled with an unfunded pension liability that stands at around \$100 billion, Illinois has been delaying the payment of billions of dollars in bills for months at a time. This has caused schools, hospitals and social service agencies to borrow money, cut jobs and services and take on personal debt.”).

⁴ CTBA Analysis at 28.

⁵ Worthington at 16.

⁶ The Institute for Illinois’ Fiscal Sustainability at the Civic Federation, State of Illinois Enacted FY2015 Budget: A Review of the Operating and Capital Budgets for the Current Fiscal Year, 5 (October 9, 2014), *available at* http://www.civicfed.org/iifs/publications/FY15_EnactedBudget.

⁷ Worthington at 9-10.

Voices In Need Across The State

Amici's experience since the onset of the Great Recession illustrates the dire state of social services in Illinois. *Amicus* Will-Grundy Center for Independent Living ("WGCIL") provides life-changing opportunities for some of Illinois' most vulnerable citizens. As one client attests, "As people pushed me along, even though I didn't like it at the time I learned to shower myself, dress myself, go to the bathroom by myself, learned to go from wheelchair to walker, to cane." Client testimonial, Will-Grundy Center for Independent Living, Finding Independence, available at <http://will-grundycil.org/successstories/finding-independence/> (last visited January 7, 2015).

The Great Recession and the social service funding crisis has only brought WGCIL and its clients "death by a thousand cuts." The economic crisis brought WGCIL more clients but cut the money to pay to service them. In FY2014, the agency served 29% more clients than it served in 2008, but it was forced to do so with 16% less state funding and 30% fewer full-time employees. During that time, the percentage of WGCIL's annual income that came from state sources fell from 43.8% to 36.3%. Additional funding cuts will threaten its ability to retain remaining staff.

Amicus Mental Health Centers of Central Illinois ("MHCCI") serves thousands of patients in Logan, Mason, Menard, Morgan, Sangamon and Scott Counties. Community mental health service providers have not received a rate increase in ten years. Like other social service providers, MHCCI has taken a double hit: budget cuts on top of millions in unpaid state bills. For example, over FY2011 and FY2012, MHCCI experienced \$1.1 million in state budget cuts and at the end of last year had \$3.8 million in unpaid bills by the State. As a result, MHCCI has been forced to cut back its services.

Further funding cuts will reduce the mental health services provided by MHCCI and hurt the people who need these services the most. MHCCI has seen that reductions in mental health services have a real impact on the community. Without treatment, people with serious mental illness may not take their prescribed medication and then become a danger to themselves or others. Some may self-medicate with alcohol and illegal drugs and others may commit minor crimes, such as panhandling and trespassing, while trying to survive. MHCCI estimates that close to a third of the people it serves in community mental health programming had some law enforcement contact over the past year. Thus, any cost savings in health care are offset by a greater cost burden in the criminal justice system.

Amicus Transition Mental Health Services (“TMHS”) and its clients have suffered a similar plight. TMHS treats patients with anxiety, depression, schizophrenia and compulsive disorders. TMHS helps these individuals – some of whom are on the verge of suicide – manage and reduce these symptoms so they can maintain a level of stability in their lives. From 2008 to 2014, funds from the state were reduced by 25% and services were cut drastically in response. Illinois Department of Human Services funding to TMHS went from 48% of the agency’s total budget in 2008 to 36% of the total budget in 2014. TMHS reduced its staffing by 6 full-time employees in response. TMHS notes that its ability to continue serving at-risk individuals will be seriously undermined by continued budget cuts and that failure to provide needed mental health services is well-known to result in increased homelessness, substance abuse, family disintegration, family abuse, neglect, and criminal activity, all of which represent costs that ultimately are passed on to communities.

Amicus Illinois Collaboration on Youth (“ICOY”) has had to cope with a 43% drop in its own state funding since FY2007, even as it works to assist youth service agencies in responding to years of budget cuts. ICOY notes that many of the agencies it serves have struggled to make infrastructure investments needed to build quality programs for at-risk youth, to attract and retain a high-quality workforce, and to implement long-term program improvements and innovations, because every dollar goes toward preserving direct mission work. With fewer effective, community-based alternatives for runaways, homeless children, and other at-risk youth, ICOY anticipates the state will see more youth in jail, in the child welfare system, and susceptible to human trafficking and prostitution rings.

Amici’s experiences are representative of the experience thousands of social service agencies have suffered across the state. A sampling of newspaper accounts chronicles the growing social service catastrophe.

Arlington Heights:

- Des-Plaines based Lutheran Social Services of Illinois reports that “too-little, too-late payments are forcing it and others to make tough choices to continue to provide services to those who need them most, including the elderly and people in addiction recovery programs.”⁸

Bloomington:

- “Chestnut [Health Systems], a substance abuse treatment program and research agency, had to close its detoxification program and cut school-based services to adjust to the loss of funding.”⁹
- Cuts in state Bureau of the Blind travel budget caused reduction in services: “It’s hard enough to be blind But this is going to be a real setback to a lot of people.”¹⁰

⁸ “Too Little, Too Late for Social Services,” *Daily Herald*, May 10, 2013.

⁹ Mary Ann Ford, “Social Service Agencies Wary of More Budget Cuts,” *The Pantagraph*, March 19, 2011, at E9.

Chicago:

- “Why is it that human service agencies take the biggest hits?”¹¹
- “State budget cuts are leaving many Illinois social service agencies scrambling, especially homeless shelters.”¹²

Effingham:

- Meals on Wheels program for elderly and disabled threatens cut-back in service from 5 to 4 days a week to address funding cut.¹³

Kewanee:

- “As many as two million people in Illinois depend on state funding for human services.... Over the last 5 years these programs have all seen cuts in excess of 20 percent.”¹⁴

Madison County:

- “State officials estimate about a third fewer families – roughly 1,500 – will be served through Intact because of the cuts,” provoking Madison County judges to speak out that more children are going to end up on abuse and neglect court dockets.¹⁵

Peoria:

- “Children will go without counseling and therapy for mental illness. Runaways won’t be able to get help from crisis prevention programs. Those abused and neglected kids in desperate need of a foster home won’t

¹⁰ Paul Swiech, “A new obstacle: State budget cut may leave blind without crucial mobility service,” *The Pantagraph*, November 7, 2014, at A1.

¹¹ Ray Long and Monique Garcia, “Social Services Balk at Quinn’s Spending Cuts,” *Chicago Tribune*, February 8, 2011 at 7 (quoting president and CEO of Community Counseling Centers of Chicago).

¹² Sophia Tareen, “Illinois poverty growing as state help shrinking,” *Associated Press*, September 17, 2011.

¹³ Bill Grimes, “Meals program might cut services,” *Effingham Daily News*, July 22, 2014, http://www.ffmpeghamdailynews.com/meals-program-might-cut-services/article_3ad3cede-e699-58c4-87c2-66100485eb5f.html.

¹⁴ “United Way officials urge state not to cut social programs,” *Kewanee Star-Courier*, May 6, 2014.

¹⁵ Nancy Cambria, “Children May Lose Families’ Care Under Illinois DCFS Cuts,” *St. Louis Post-Dispatch*, September 18, 2012.

have anyone to provide those services. Hundreds locally will lose their jobs.”¹⁶

Springfield:

- “Cut[s] would eliminate funding for 55,000 of the 69,000 people in Illinois who received state-subsidized drug treatment services”¹⁷

Woodstock:

- “Continued lack of funding, or further state cuts, could translate to a higher cost to taxpayers to incarcerate people who could stay out of trouble with proper help.”¹⁸

State Pension Payments Will Only Further “Crowd Out” Social Services

In FY1997, the State’s pension costs consumed only 3.9% of the tax revenues, and by FY2007, these costs were 6.2% of tax revenues.¹⁹ By FY2013, pension payments had ballooned to 19.2% of the State’s tax revenues.²⁰ Without pension reform, the percentage of State tax dollars will continue to increase, approaching 30% in future years according to one of the State’s experts.²¹ J.P. Morgan conducted an independent analysis and paints an even bleaker future for Illinois – Illinois pension and retiree health care costs approach 40% of state tax revenues.²² Figure 1 on the following page depicts the growing “crowd out.”

¹⁶ Karen McDonald, “Budget means social services will suffer,” *Journal Star*, June 19, 2009.

¹⁷ Dean Olsen, “Officials Rip Proposal to Cut Drug Treatment,” *Springfield State Journal-Register*, February 23, 2011, at 17.

¹⁸ Kevin P. Craver, “Mental Health Groups Ask County Board To Pressure Legislators,” *The Northwest Herald*, March 7, 2012 (quoting McHenry County’s coordinator for mental health and drug courts).

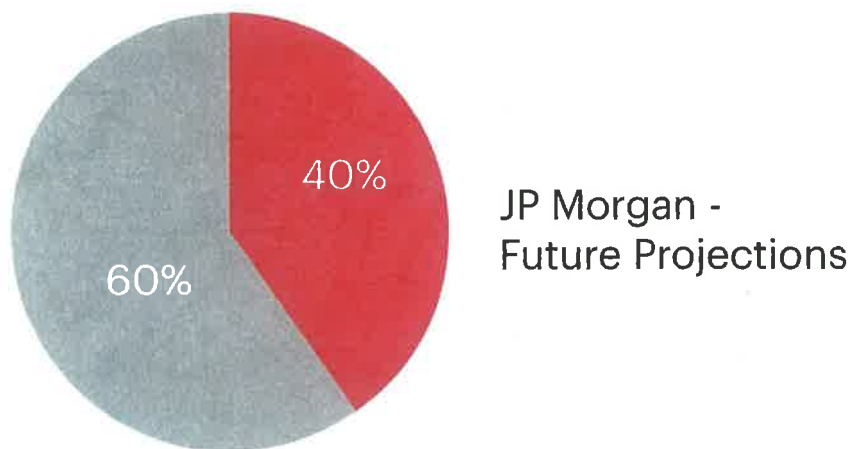
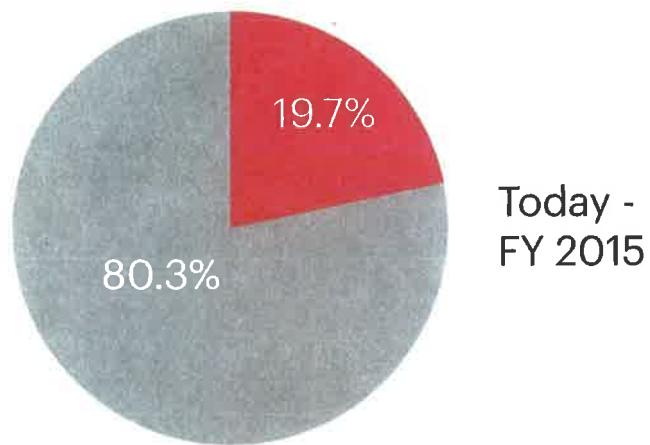
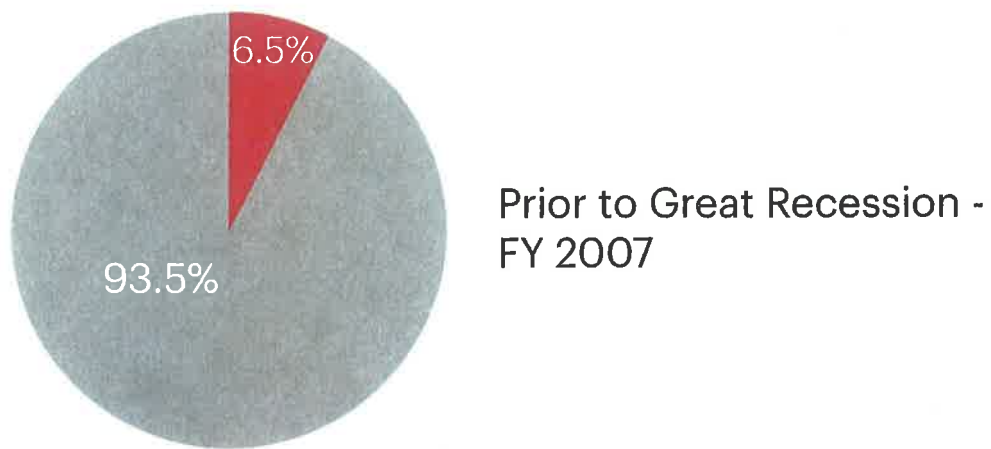
¹⁹ Worthington at 6.

²⁰ *Id.*

²¹ Worthington at Figure 6 (“Pension Costs As Share of Total Tax Revenues”).

²² J.P. Morgan Asset Management, *The Arc and the Covenants: Assessing The Ability of States to Service Debt, Pension and Retiree Health Costs In A World of Finite Resources*, 1 (June 5, 2014), available at http://www.ctpolicyinstitute.org/content/The_ARC_and_the_Covenants.pdf.

Figure 1



■ State Revenues Spent on Pensions

Further Spending Cuts Are Not An Option

If the trial court is affirmed and the pension reforms are rejected, the social service safety net will be shredded in Illinois. Statistics establish that “Illinois is a very low spending small government state.”²³ Illinois ranks “49th out of 50 states in the number of state workers per 1,000 residents.”²⁴ Unable to downsize government employees, the State will have to further slash funding to social service providers like *amici*.

As the state’s budget experts below explained, cutting costs is not a simple matter of shaving a little across the board. Out of the \$72.26 billion FY2015 state operating budget, 50% must statutorily be used for a particular purpose, leaving only \$36.08 billion in general funds spending.²⁵ But only 23% of general funds spending is “discretionary,” and those discretionary spending items include (i) elementary and secondary education, (ii) human services, including services for the developmentally disabled, mentally ill, elderly and other at-risk individuals, (iii) higher education, and (iv) public safety.²⁶ The factual record before the trial court established that funding for these items already has been cut to the point that the state is unable to fully meet its commitment to these populations. These cuts have forced many social service agencies who serve at-risk populations to reduce the level of services they provide and the number of people they can help even as the number of people in need has increased as a direct result of the Great Recession.

²³ CTBA Analysis at 2.

²⁴ CTBA Analysis at 16.

²⁵ Basham at 9.

²⁶ Basham at 10.

ARGUMENT

I. The Trial Court Abdicated The Judicial Function When It Granted The Pension Clause Immunity From Balancing Against the State's Interests.

The Attorney General presented a comprehensive factual record establishing that, absent the pension reforms of Public Act 98-0599, there is a clear and present danger to the State's finances and the State's ongoing ability to provide its citizens the necessary services of government. That record sets forth the economic crisis of the Great Recession, the crisis' catastrophic economic harm to the funding of public pensions, the reasonableness of the Act's provisions to address the crisis, and the consequences to the State and its citizens if the pension reforms are not sustained. The trial court committed legal error in refusing to consider these undisputable facts, by holding that the terms of the Pension Clause alone granted state pension fund members an *absolute* constitutional right. (C2312-2317.)

This Court is the final expositor of the Illinois Constitution. As set forth in the Constitution's Preamble, the Constitution was ordained and established to accomplish no fewer than 15 broad, and often, competing, purposes:

We, the People of the State of Illinois - grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors - in order to provide for the health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity - do ordain and establish this Constitution for the State of Illinois.

Ill. Const., Preamble. These purposes, and the values that underlie them, must be balanced by all three branches of our state government to maximize the welfare of all of our citizens.

The essence of the judicial function, particularly in constitutional adjudication, is to balance competing interests. “[T]he judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule or another.” Harlan Stone, *The Common Law in the United States*, Harv. L. Rev. 4, 20 (1936). Benjamin Cardozo, *The Paradoxes of Legal Science*, 75 (1928) (“We are balancing and compromising every moment that we judge.”); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897) (“[T]he judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.”); Roscoe Pound, *A Survey of Social Interests*, 58 Harv. L. Rev. 1, 39 (1943) “Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, *so as to insure the least sacrifice of both types of social advantage, is the perpetual question of constitutional law.*” Stone, at 22 (emphasis added).

Take the free speech clause of the First Amendment to the United States Constitution, for example. The First Amendment, much like the Pension Clause in this case, is written in absolutist terms: “Congress shall make no law ... abridging the freedom of speech.”²⁷ But the courts have never held that the First Amendment grants

²⁷ U.S. Const. amend. I.

citizens an absolute right to speak. The courts have balanced free speech rights to protect other state interests.

Over the years, for example, the courts have established time, place and manner restrictions on when or where speech can be made. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). The courts have employed balancing to exclude from protection whole classes of speech despite the “absolute” terms of the First Amendment. *E.g.*, defamation, *Gertz v. Welch*, 418 U.S. 323 (1974); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); pornography, *Miller v. California*, 413 U.S. 15 (1973); and sexual materials harmful to minors, *New York v. Ferber*, 458 U.S. 747 (1982).

Indeed, when the Nation’s very security has been at stake, the courts have balanced interests in speech cases, asking whether “the gravity of the ‘evil’ discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger.” *Dennis v. United States*, 341 U.S. 494, 510 (1951). Interests of public safety and order trump freedom of expression to condemn crying “Fire” in a crowded theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919). As two noted constitutional scholars recently observed, such reasoning “captures a sensible intuition: the Constitution is not a suicide pact.” Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution*, 154 (2014).

Economic rights, like liberty rights, are also balanced in accord with settled rules of constitutional adjudication. The Contract Clauses of both the U.S. and the State Constitution bear directly on the issues in this case. Echoing the absolute language of the

First Amendment and the Pension Clause in this case,²⁸ both these clauses condemn state laws that “impair” contracts. The provisions provide:

“No state shall ... pass any ... law impairing the Obligation of contracts...” U.S. Const., art. 1 § 10, cl. 1.

No ... law impairing the obligation of contracts ... shall be passed.” Ill. Const., art. 1, § 16.

But the courts have long said that it is “beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.” *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 428 (1934). “[A]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’” *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983) (internal citation omitted).

Chief Justice Hughes’ majority opinion in *Home Bldg. & Loan Ass’n v. Blaisdell* sets forth the reasons for Contract Clause balancing. *Blaisdell* and its reasoning should carry special weight in this Court because this Court has agreed with “the holding in the *Blaisdell* case.” *Town of Cheney’s Grove v. VanScoyoc*, 357 Ill. 52, 64 (1934). Moreover, this Court has held that the Contract Clause in the Illinois Constitution is “interpreted in the same fashion” as its federal counterpart and “does not immunize contractual obligations from every conceivable kind of impairment or from the effect of a reasonable exercise by the States of their police power.” *George D. Hardin Inc. v. Village of Mount Prospect*, 99 Ill.2d 96, 103 (1983).

²⁸ The Illinois Constitution’s Pension Clause provides: “Membership in any pension or retirement system of the State, any unit of local government or school districts, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.” Ill. Const. art. XIII, § 5.

Blaisdell held that a state statute that imposed a moratorium on mortgage foreclosures during the Great Depression did not violate the federal Contract Clause. Chief Justice Hughes reached this result even though 1) it was “conced[ed] that the obligations of the mortgage contract were impaired” and 2) the very purpose of the Contract Clause was to prohibit debtor-relief legislation that had disrupted commerce in the state during the Articles of Confederation. 290 U.S. at 420, 427-28. The economic emergency of the Great Depression, like the emergency of a war, required the state to exercise its reserved powers “to safeguard the vital interests of its people.” 290 U.S. at 435. *Blaisdell* then reasoned that the policy protecting contracts from impairment was not worth much if the state was unable to take steps to ensure that the economy and government were in good order:

Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts *against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, – a government which retains adequate authority to secure the peace and good order of society.* This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

290 U.S. at 435 (emphasis added). So long as the legislation was “addressed to a legitimate end and the measures taken are reasonable and appropriate to that end,” the legislation did not offend the Contract Clause because it was “for the protection of a basic interest of society.” 290 U.S. at 438, 445.

Since *Blaisdell*, the courts have made clear that there need not be an “emergency” or a “temporary” loss of rights for state legislation to pass constitutional muster under the

Contract Clause. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 n.19 (1977). And it is equally clear that “The Contract Clause is not an absolute bar to subsequent modification of a State’s own financial obligations.” 431 U.S. at 25, *citing, inter alia, Fایتoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 511 (1942) (upholding state law authorizing adjustment of municipal bond debt binding on all creditors upon assent by 85% of creditors because, as a practical matter, the city could not raise taxes enough to pay off its creditors under the old contract terms). In all of these cases, the courts “balanced the language of the Contract Clause against the State’s interest in exercising its police power” *Energy Reserves Group*, 459 U.S. at 410 (1983).

The Pension Clause should be treated no differently. Just as the courts balance vital State interests against the economic rights protected by the Contract Clause and liberty rights under the First Amendment, this Court should balance the State’s vital rights in protecting all of its people against rights asserted under the Pension Clause. *See People ex rel. Sklodowski v. State*, 162 Ill.2d 117, 147 (1994) (Freeman, J. concurring in part, dissenting in part) (“The protection against impairment of State pension benefits is co-extensive with the protection afforded all contracts under Article 1, Section 16 of the Constitution”). There is nothing in the language of the 1970 Constitution or the constitutional debates that preceded its adoption that supports the notion that public pension contracts have more protection than private contracts under the State Constitution.

The pension reforms of Public Act 98-0599 “safeguard the vital interests” of all of the people of Illinois. The economic reality is that there is only a finite amount of

discretionary state revenues. As pension payments mushroom to 30 and 40 percent of every state revenue dollar, there will be a pension payment “crowd out” of funding for the most basic of services. Ever-decreasing funds will be available to support public services, critical infrastructure, education and the social safety net. If past is prologue, there will not even be scraps to pay for the social services of those most in need at the end of the day. If the values enshrined in the Preamble of the State’s Constitution – to ensure social and economic justice, to eliminate poverty and inequality, to provide for the health, safety and welfare of all of the people – are to be more than hollow promises, the sovereign must have the authority to honor and fund them in the time of need. The Pension Clause, much like the First Amendment, cannot transform the Constitution into a suicide pact for the citizens of our State.

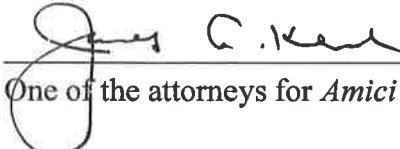
In sum, there is no principled basis to accord Pension Clause rights absolute protection while other constitutional and contract rights are harmonized with other public interests.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the arguments of the State of Illinois be adopted and the decision of the trial court reversed.

Dated: January 12, 2015

Respectfully submitted,


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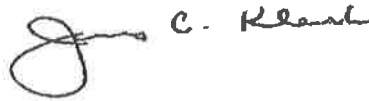
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CERTIFICATE OF COMPLIANCE

I, James A. Klenk, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 18 pages.

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